

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CENTER FOR
EQUITABLE TREATMENT, INC.,
6100 Elton Avenue, Suite 1000
Las Vegas, NV 89107,

Plaintiff,

v.

Civil Action No. 1:19-cv-03207

UNITED STATES PATENT AND
TRADEMARK OFFICE,
600 Dulany Street,
Alexandria, VA 22314,

Defendant.

COMPLAINT

Plaintiff American Center for Equitable Treatment, Inc. (“ACET”) for its Complaint against the United States Patent and Trademark Office (“PTO”), alleges as follows:

Nature of the Action

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, challenging the Defendant Patent and Trademark Office’s failure to provide the responsive records that ACET requested pursuant to FOIA. ACET filed a FOIA request on April 26, 2019, and PTO has never responded. ACET is entitled to a determination on its FOIA request and production of all responsive records.

Parties

2. American Center for Equitable Treatment, Inc. (“ACET”) is a nonprofit corporation that is dedicated to educating Americans about the economic and social benefits of the federal government’s fair, efficient, and effective administration of technology, innovation, and intellectual property laws and policies.

3. Defendant United States Patent and Trademark Office is the federal agency responsible for examining patent applications and for issuing U.S. patents. The PTO's headquarters is located in Alexandria, Virginia.

Jurisdiction and Venue

4. This action arises under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

5. Venue is proper in this judicial district pursuant to 5 U.S.C. § 552(a)(4)(B).

Statutory Background

6. The Freedom of Information Act promotes government transparency and mandates that federal agencies make certain agency records promptly available to any person upon request. 5 U.S.C. § 552(a)(3)(A).

7. FOIA imposes strict deadlines on agencies to respond to requests for records. 5 U.S.C. § 552(a)(6)(A) (requiring the agency to “immediately notify” the requester within the statutory deadline for responding).

8. FOIA requires agencies to search for records in a manner that is reasonably calculated to locate responsive records. 5 U.S.C. § 552(a)(3).

9. The agency must issue a determination on a FOIA request within 20 business days after receiving the FOIA request. 5 U.S.C. § 552(a)(6)(A).

10. The agency may receive a 10-day extension to provide its determination on a FOIA request upon a showing of “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B). To extend the deadline for responding, the agency must give written notice to the requester describing the unusual circumstances and the date when a response may be expected.

11. The agency must provide the requester with reasons for its determination. 5 U.S.C. § 552(a)(6)(A)(i)(I).

12. FOIA places the burden on the agency to prove that it may withhold responsive records pursuant to any of nine specific exemptions. 5 U.S.C. § 552(a)(4)(B); 5 U.S.C. § 552(b).

13. The agency must notify the requester of the right to seek assistance from the agency's FOIA Public Liaison. 5 U.S.C. § 552(a)(6)(A)(i)(II).

14. Upon an adverse determination, the agency must notify the requester of the right to appeal the agency's determination or seek dispute resolution services from the agency's FOIA Public Liaison or the Office of Government Information Services. 5 U.S.C. § 552(a)(6)(A)(i)(III).

15. If the agency has failed to comply with the FOIA's time limits, it is barred by 5 U.S.C. § 552(a)(4)(A)(viii) from assessing search fees and, with respect to certain requesters, duplication fees.

Factual Allegations

16. On April 26, 2019, ACET requested the following records pursuant to the Freedom of Information Act, 5 U.S.C. § 552:

a. PTO FOIA logs for all FOIA requests received from October 1, 2015, to the present date. As the PTO tracks in its reports on FOIA, please tabulate these FOIA logs by: Request ID, Requester Name, Organization, Received Date, Request Description, Closed Date, Exemption Cited, and Fee Determinations.

b. PTO submissions to the U.S. Department of Commerce from the past three years in response to agency surveys and/or questionnaires used by Department to compile and generate its annual U.S. Department of Commerce Chief FOIA Officer Report. Responsive records include, but are not limited to, the PTO's FOIA Annual Report pursuant to 5 U.S.C. § 552 and any submissions relating to the associated guidance of the Department of Justice.

Ex. A (ACET's FOIA Request No. F-19-00185).

17. ACET explained that pursuant to 37 C.F.R. § 102.11(d)(4) fees should not be assessed for its request because the requested records could be readily located without undue search burden.

18. Alternatively, if the PTO intended to assess fees, ACET requested a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (public interest fee waiver) and 5 U.S.C. § 552(a)(4)(A)(ii)(II) (representative of the news media).

19. ACET requested a public-interest fee waiver because the requested records “directly concern and bear upon the regularity of the government’s operations and activities and would be highly informative to the general public regarding the PTO’s policies, including on matters directly affecting the public access to information under the FOIA.”

20. ACET also qualifies as a “representative of the news media” under FOIA for fee-status purposes. ACET gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience, as evidenced on its website, which is www.acet-usa.org.

21. In a letter dated April 29, 2019, the PTO acknowledged receipt of ACET’s FOIA request, designated it as Request No. F-19-00185, and stated it “expects to send its response to this request no later than Friday, May 24, 2019.” Ex. B.

22. PTO has never responded to ACET’s FOIA requests.

23. PTO has never claimed any unusual circumstances exist, potentially allowing it to extend the time to respond.

24. The statutory deadline for the PTO to respond to ACET’s request for records has long since expired. 5 U.S.C. § (a)(6)(A) (providing the statutory deadline for responding to a FOIA request).

25. ACET has thus constructively exhausted all administrative remedies. *Judicial Watch, Inc. v. U.S. Dep’t of Energy*, 888 F. Supp. 2d 189, 192–93 (D.D.C. 2012) (quotation marks and citations omitted) (“If the agency fails to notify the requestor of its determination within twenty days of the request being filed, a plaintiff shall be deemed to have constructively exhausted [its] administrative remedies and can file suit.”).

26. Moreover, because the PTO has failed to comply with the FOIA’s time limits it is barred by 5 U.S.C. § 552(a)(4)(A)(viii) from assessing fees in this case.

Count 1: Failure to Respond to ACET's FOIA Request

27. The above paragraphs are hereby incorporated by reference as if set forth fully herein.
28. ACET has a statutory right to a determination on its FOIA request.
29. PTO failed to respond to the ACET's request within the statutorily mandated timeframe, in violation of the ACET's rights under FOIA. 5 U.S.C. § 552(a)(6).
30. ACET is entitled to injunctive relief requiring the PTO to provide a determination on its FOIA request.

Count 2: Failure to Produce Responsive Records to ACET's FOIA request

31. The above paragraphs are hereby incorporated by reference as if set forth fully herein.
32. ACET has a statutory right to responsive records to its FOIA request.
33. PTO failed to make reasonable efforts to search for records responsive to ACET's request, in violation of the ACET's rights under FOIA. 5 U.S.C. § 552(a)(3).
34. PTO failed to disclose and produce responsive records, in violation of ACET's rights under FOIA. 5 U.S.C. § 552(a)(3)(A).
35. PTO failed to provide a legal basis for withholding responsive records. *See* 5 U.S.C. §§ 552(a)(3)(A) and (6)(A).
36. ACET is entitled to injunctive relief requiring the PTO to produce responsive records to its FOIA request.

Count 3: Determination that ACET Is Entitled to a Public-Interest Fee Waiver

37. The above paragraphs are hereby incorporated by reference as if set forth fully herein.
38. FOIA requires that documents "shall be furnished at no charge" or a reduced charge when the disclosure of the information is in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii).

39. The requested records directly concern the regularity of the government's operations and will be highly informative to the general public.

40. ACET is entitled to a fee exemption because the requested records concern a matter of public interest.

Count 4: Determination that ACET Is a Representative of the News Media

41. The above paragraphs are hereby incorporated by reference as if set forth fully herein.

42. FOIA limits fees to reasonable standard charges for document duplication when records are requested from a representative of the news media and not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

43. ACET is not requesting these records for a commercial use.

44. ACET satisfies the definition for a "representative of the news media" as required in *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1120 (D.C. Cir. 2015) (holding that to be a representative of the news media the "requester must: (1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience.").

45. ACET gathers information on technological innovation, intellectual property protection, economic prosperity, and government accountability.

46. ACET provides this information to scholars, policy makers, journalists, and individuals.

47. ACET uses its editorial skills to transform the raw materials into distinct works, including through reports, press releases, and blog posts.

48. ACET distributes this work to the audience, primarily through its website, <http://acet-usa.org/about/>.

49. ACET is entitled to a determination that for FOIA fee-statute purposes it is a representative of the news media.

Count 5: Determination that ACET Need Not Pay Fees

50. Because the PTO has failed to comply with the FOIAs time limits, it is barred by 5 U.S.C. § 552(a)(4)(A)(viii) from assessing fees with respect to ACET's request.

51. Accordingly, ACET is entitled to a determination that the PTO is barred from charging it fees in connection with ACET's request.

Prayer for Relief

WHEREFORE, Plaintiff respectfully requests that this Court

- A. Find that PTO's failure to timely respond or disclose the requested records is unlawful under FOIA;
- B. Order PTO to conduct a reasonable search for all responsive records;
- C. Order PTO to promptly disclose all responsive records;
- D. Determine that ACET is entitled to a fee waiver because the requested records concern matters of public interest;
- E. Determine that ACET is a representative of the news media;
- F. Determine that ACET need not pay search fees for its request;
- G. Award ACET the cost of this litigation and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
- H. Grant such other and further relief as the Court may deem just and proper.

Dated: October 25, 2019

Respectfully submitted,

/s/ Andrew M. Grossman
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